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May 20, 2010

The Harris County Commissioners Court
1001 Preston, Suite 938
Houston, Texas 77002

Judge Ed Emmett
1001 Preston, Suite 911
Houston, Texas 77002

Dear Commissioners & Judge Emmett,

I write to commend the Harris County Board of Commissioners on their desire to enhance the current provision of services for indigent defendants in a manner that provides quality representation and fiscal predictability, as expressed in the 2011 Harris County Discretionary Grant Application Narrative. A commitment to justice for all is a cornerstone of the American social contract. The strength of our republic rests on the belief – and the reality – that our trials are fair and accurate and that the results are swift and final. This *must* be the case, not only for the victim and the accused in a particular crime, but for all of us for whom the courts are the bulwark of a safe, secure and fair society. Harris County is the most populous county in the United States that does not have a staffed public defender office. The decision to seek funds to create a public defender office is consistent with national standards calling for jurisdictions to establish public defender offices wherever caseloads are sufficiently high.

However, the structure of the proposed pilot office does not adequately address certain systemic deficiencies in public defense services that presently exist in Harris County and will fail to fully achieve your laudable aims, as detailed below.

National Legal Aid & Defender Association (NLADA)

The National Legal Aid & Defender Association (NLADA) is a national, non-profit membership association dedicated to quality legal representation for people of insufficient means. Created in 1911, NLADA has been a leader in supporting equal justice for nearly 100 years. NLADA currently supports a number of initiatives, including the American Council of Chief Defenders (ACCD), a leadership forum that brings together the top defender executives nationwide, and the National Defender Leadership Institute (NDLI), an innovative training project to support current managers and develop future leaders. Over its long history, NLADA has become a leader in the development of national standards for indigent defense functions and systems.[1]

[1] See: Guidelines for Legal Defense Systems in the United States (National Study Commission on Defense Services [staffed by NLADA; commissioned by the U.S. Department of Justice], 1976); The Ten Principles of a Public Defense Delivery System (written by NLADA officials, adopted by ABA in February 2002, published in U.S. Department of Justice *Compendium of*

The Importance & Value of National Standards of Justice

NLADA promotes the use of and adherence to national standards in all aspects of indigent defense systems and services. The concept of using standards to assure uniform quality is not unique to the field of indigent defense. In fact, the strong pressures on public officials from favoritism, partisanship, and/or profit all underscore the need for standards to assure quality in every facet of government, including all components of the justice system. For instance, realizing that standards are necessary to both compare bids equitably and to assure quality products, policymakers long ago standardized requests for proposals and ceased taking the lowest bid to build a hospital, school or a bridge, instead requiring winning contractors to meet minimum quality standards for safety. Ensuring the rights of the individual against the undue taking of his liberty by the state merits no less consideration.

The use in this way of national standards for justice is reflected in the mandates of the United States Supreme Court as set forth in *Wiggins v. Smith*, 539 US 510 (2003) and *Rompilla v. Beard* 545 US 374 (2005). In *Wiggins*, the Court recognized that national standards, including those promulgated by the American Bar Association (ABA), should serve as guideposts for assessing ineffective assistance of counsel claims. The ABA standards define what is required for counsel to be competent, addressing not only the attorney's personal abilities and qualifications, but also the systemic environment in which the attorney practices – the system that provides the time, resources, independence, supervision and training to effectively carry out the charge to adequately represent clients. *Rompilla* echoes those sentiments, noting that the ABA standards describe the obligations of defense counsel "in terms no one could misunderstand."

The American Bar Association's *Ten Principles of a Public Defense Delivery System* presents the most widely accepted and used version of national standards for indigent defense. Adopted in February 2002, the ABA *Ten Principles* distill the existing voluminous ABA standards for indigent defense systems to their most basic elements, which officials and policymakers can readily review and apply.[2] In the words of the ABA Standing Committee on Legal Aid and Indigent Defendants, the *Ten Principles* "constitute the fundamental criteria to be met for a

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Standards for Indigent Defense Systems, infra n.12) (http://www.abanet.org/legalservices/downloads/sclaid/10principles.pdf); Standards for the Appointment and Performance of Counsel in Death Penalty Cases (NLADA, 1988; ABA, 1989), Defender Training and Development Standards (NLADA, 1997); Performance Guidelines for Criminal Defense Representation (NLADA, 1995); Guidelines for Negotiating and Awarding Contracts for Criminal Defense Services (NLADA, 1984; ABA, 1985); Standards for the Administration of Assigned Counsel Systems (NLADA, 1989); Standards and Evaluation Design for Appellate Defender Offices (NLADA, 1980); Evaluation Design for Public Defender Offices (NLADA, 1977); and Indigent Defense Caseloads and Common Sense: An Update (NLADA, 1994). Other related national standards: American Bar Association, Standards for Criminal Justice, Providing Defense Services (3rd ed., 1992); American Bar Association, Standards for Criminal Justice: Defense Function (3rd ed., 1993); Report on Courts, Chapter 13: The Defense (National Advisory Commission on Criminal Justice Standards and Goals, 1973).

[2] The *Ten Principles of a Public Defense System* is based on a paper by James Neuhard, State Appellate Defender of Michigan and former NLADA President, and H. Scott Wallace, NLADA Director of Defender Legal Services, which was published in December 2000 in the *Compendium of Standards for Indigent Defense Systems* www.ojp.usdoj.gov/indigentdefense/compendium/.

public defense delivery system to deliver effective and efficient, high quality, ethical, conflict-free representation to accused persons who cannot afford to hire an attorney."[3]

NLADA Right to Counsel Research in Harris County

From March to May of 2009, NLADA provided technical assistance to the Houston CBS-News affiliate (KHOU-TV) and reporter Mark Greenblatt through an analysis of Harris County's assigned counsel data for fiscal year 2002-2009 (year to date). I was subsequently interviewed for the resulting story, "*Experts: Harris Co. Taking risks with lawyer appointment system,*" airing May 19, 2009.

NLADA found private attorneys carrying caseloads far in excess of nationally recognized indigent defense standards. Regulating an attorney's workload is perhaps the simplest, most common and direct safeguard against overloaded public defense attorneys and deficient defense representation for low-income people facing criminal charges. The National Advisory Commission (NAC) on Criminal Justice Standards and Goals first developed numerical caseload limits in 1973 under the auspices of the U.S. Department of Justice, which, with modifications in some jurisdictions, have been widely adopted and proven quite durable in the intervening three decades.[4] NAC Standard 13.12 on Courts states: "The caseload of a public defender attorney should not exceed the following: felonies per attorney per year: not more than 150; misdemeanors (excluding traffic) per attorney per year: not more than 400; juvenile court cases per attorney per year: not more than 200; Mental Health Act cases per attorney per year: not more than 200; and appeals per attorney per year: not more than 25."[5] What this means is that an attorney who handles only felony cases should handle no more than 150 such cases in a single year *and nothing else*. The ABA's *Ten Principles* support these national standards with their instruction that caseloads should "under no circumstances exceed" these numerical limits.[6]

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[3] American Bar Association. *Ten Principles of a Public Defense System*, from the introduction. at: http://72.14.207.104/search?q=cache:li1_aP9C2sJ:www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf+ABA+Ten+Principles&hl=en&gl=us&ct=clnk&cd=1

[4] See *Indigent Defense Caseloads and Common Sense: An Update* (NLADA, 1992), surveying state and local replication and adaptation of the NAC caseload limits.

[5] National Advisory Commission on Criminal Justice Standards and Goals, Task Force on Courts, *Courts* (Washington, D.C., 1973), p. 276, Standard 13.12.

[6] The NAC workload standards have been refined, but not supplanted, by a growing body of methodology and experience in many jurisdictions for assessing "workload" rather than simply the number of cases, by assigning different "weights" to different types of cases, proceedings and dispositions. *See Case Weighting Systems: A Handbook for Budget Preparation* (NLADA, 1985); *Keeping Defender Workloads Manageable*, Bureau of Justice Assistance, U.S. Department of Justice, Indigent Defense Series #4 (Spangenberg Group, 2001) (www.ncjrs.org/pdffiles1/bja/185632.pdf).

Workload limits have been reinforced in recent years by a growing number of systemic challenges to underfunded public defense systems, where courts do not wait for the conclusion of a case, but rule before trial that a defender's caseloads will inevitably preclude the furnishing of adequate defense representation. *See, e.g., State ex rel. Wolff v. Ruddy*, 617 S.W.2d 64 (Mo. 1981), *cert. den*. 454 U.S. 1142 (1982); *State v. Robinson*, 123 N.H. 665, 465 A.2d 1214 (1983) *Corenevsky v. Superior Court*, 36 Cal.3d 307, 682 P.2d 360 (1984); *State v. Smith*, 140 Ariz. 355, 681 P.2d 1374 (1984); *State v. Hanger*, 146 Ariz. 473, 706 P.2d 1240 (1985); *People v. Knight*, 194 Cal. App. 337, 239 Cal. Rptr. 413 (1987); *State ex rel. Stephan v. Smith*, 242 Kan. 336, 747 P.2d 816 (1987); *Luckey v. Harris*, 860 F.2d 1012 (11th Cir. 1988), *cert den*. 495 U.S. 957 (1989); *Hatten v. State*, 561 So.2d 562 (Fla. 1990); *In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit*, 561 So.2d 1130 (Fla. 1990); *State*

Numerous examples of attorneys carrying too many cases were found throughout our research. For example, in 2008, Attorney A earned $375,350 and carried a caseload that was 265.7% above national standards (391 felonies; 20 misdemeanors). In the eight year period reviewed, that same attorney handled 2,247 felonies with no record of having been paid for an appeal in a single case. Attorney B earned $260,728 in 2008 and carried a caseload that was 432.7% above recognized standards. He handled more than a full-time equivalent number of felonies (177 compared to the standard of 150) in addition to 12 appeals *and 8 capital cases*. National experience (which can be supported by ABA standards) shows that an attorney should handle no more than 3 capital cases per year *and nothing else*. Similarly, in 2004, Attorney C earned $331,389 for working at 340.8% of national workload standards – (96 felonies, 14 misdemeanors, 10 appeals, and 7 capital cases).

The problems of high caseloads were further impacted by the lack of supervision of attorney performance. ABA *Principle 10* requires a system of supervision and performance review because without supervision attorneys are left to determine on their own what constitutes competent representation and will often fall short of that mark. To help attorneys, an effective performance plan should be developed – one that is much more than an evaluation form or process for monitoring compliance with standards -- and should include: a) clear plan objectives; b) specific performance guidelines; c) specific tools and processes for assessing how people are performing relative to those expectations and what training or other support they need to meet performance expectations; and, d) specific processes for providing training, supervision, and other resources that are necessary to support performance success.

Currently, no such system of checks and balances exist in Harris County to ensure that public counsel attorneys have the time, tools and training to provide constitutionally adequate services *before* assignments are made. A judge in one courtroom may have a reasonable estimation of the number of assignments made to an attorney in his courtroom, but has no way of knowing how many public cases that attorney is handling in another judge's courtroom or even how many private cases the attorney is actively working. Without an independent oversight to provide such coordination, administration and supervision, any system – whether appointed counsel or a staffed public defender office – will inevitably lead to the type of work overload and inefficient use of tax-payer money highlighted in the KHOU report.

To the extent that any supervision of attorney performance is being conducted, it is being done by judges. Such performance review procedures are expressly forbidden under ABA *Principle 1*.

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v. Lynch, 796 P.2d 1150 (Okla. 1990); *Arnold v. Kemp*, 306 Ark. 294, 813 S.W.2d 770 (1991); *City of Mount Vernon v. Weston*, 68 Wash. App. 411, 844 P.2d 438 (1993); *State v. Peart*, 621 So.2d 780 (La. 1993); *Kennedy v. Carlson*, 544 N.W.2d 1 (Minn. 1996). Many other cases have been resolved by way of settlement.

American Bar Association (Principle 1): Independence of the Defense Function

The failure of having judges overseeing the attorneys designated to represent low-income people was pointed out by the U.S. Supreme Court over 80 years ago during the Scottsboro Boys' case in which nine young men of color were falsely accused, found guilty and sentenced to die. Bemoaning the fact that the trial judge hand-picked unqualified attorneys, the Court opined: "[H]ow can a judge, whose functions are purely judicial, effectively discharge the obligations of counsel for the accused? He can and should see to it that, in the proceedings before the court, the accused shall be dealt with justly and fairly. He cannot investigate the facts, advise and direct the defense, or participate in those necessary conferences between counsel and accused which sometimes partake of the inviolable character of the confessional."[7]

This first of the ABA's *Ten Principles* explicitly limits judicial oversight and calls for the establishment of an independent oversight board whose members are appointed by diverse authorities, so that no single official or political party has unchecked power over the public defense function. As stated in the U.S. Department of Justice, Office of Justice Programs report, *Improving Criminal Justice Through Expanded Strategies and Innovative Collaborations: A Report of the National Symposium on Indigent Defense*: "The ethical imperative of providing quality representation to clients should not be compromised by outside interference or political attacks."[8] Courts should have no greater oversight role over lawyers representing defendants than they do for attorneys representing paying clients. The courts should also have no greater oversight of public defense practitioners than they do over prosecutors. As far back as 1976, the National Study Commission on Defense Services concluded that: "The mediator between two adversaries cannot be permitted to make policy for one of the adversaries."[9]

The lack of independence negatively affects public defense systems in a variety of ways, depending on the type of system. With appointed counsel systems – like your current system -- the concern is with unilateral judicial power to select lawyers to be appointed to individual cases and to reduce or deny the lawyer's compensation. Defense attorneys (especially those who have practiced in front of the same judiciary for long periods of time) instinctively understand that their personal income is tied to "keeping the judge happy" rather than zealously advocating for their clients. And, in jurisdictions that place a high emphasis on celerity of case processing, the defense attorneys simply understand they are not to do anything that will slow down the pace of disposing of cases or risk the pay that a judge has been able to secure for them. Over time, the defense attorney is indoctrinated into the culture of the judge's courtroom, triaging the responsibilities all lawyers owe their clients.

But moving to a public defender model without ensuring proper independence will not make a fundamental difference. For public defender offices, independence is necessary to address the concerns associated with vesting the hiring and firing of the chief executive with an official whose interests at times will invariably be at odds with the principles of "zealous advocacy,"

[7] *Powell v. Alabama*, 287 U.S. 45 (1932).
[8] NCJ 181344, February 1999, at 10.

[9] *NSC* Report, at 220, citing National Advisory Commission on criminal Justice Standards and Goals (1973), commentary to Standard 13.9.

which defenders are ethically bound to provide. For example, in the case of the judiciary there is a tension between the ever-present pressure to "move cases" along on the docket and the dictates of "zealous advocacy" that include adequate time to investigate and otherwise prepare for trial. If a judicial authority is also the appointing authority for the public defender, the court can remove the chief executive if it is not satisfied with the agency's performance in case processing and simply appoint an executive more apt to do the court's bidding.

Moreover, judges' time is far too valuable for them to be wasting it tracking down attorney caseload numbers, deciding who is qualified to handle certain types of cases, and/or making decisions about the quality of representation. While the vast majority of judges strive to do justice in all cases, political pressures, administrative priorities such as the need to move dockets, or publicity generated by particularly notorious crimes can all make it difficult for even the most well-meaning judges to maintain their neutrality when it comes to assigning cases. In reforming the indigent defense system, Harris County policymakers need to let judges be judges.

The same standards that call for independence from undue judicial interference also recognize that political interference is equally deleterious to a public defender system. ABA *Principle 1* calls for the establishment of an independent oversight board whose members are appointed by diverse authorities, so that no single official or political party has unchecked power over the indigent defense function. *Principles 1* references NLADA's *Guidelines for Legal Defense Systems in the United States* in defining the composition of said oversight boards. Guideline 2.10 states:

> A special Defender Commission should be established for every defender system, whether public or private. The Commission should consist of from nine to thirteen members, depending upon the size of the community, the number of identifiable factions or components of the client population, and judgments as to which non-client groups should be represented.

Commission members should be selected under the following criteria:

> The primary consideration in establishing the composition of the Commission should be ensuring the independence of the Defender Director.
>
> (a) The members of the Commission should represent a diversity of factions in order to ensure insulation from partisan politics.
>
> (b) No single branch of government should have a majority of votes on the Commission.
>
> (c) Organizations concerned with the problems of the client community should be represented on the Commission.
>
> (d) A majority of the Commission should consist of practicing attorneys.
>
> (e) The Commission should not include judges, prosecutors, or law enforcement officials.
>
> Members of the Commission should serve staggered terms in order to ensure continuity and avoid upheaval.

Analysis of Proposal & Recommendations

1. Policymakers should guarantee to the public that critical decisions regarding whether a case should go to trial, whether motions should be filed on a defendant's behalf, or whether certain witnesses should be cross-examined are based solely on the factual merits of the case and <u>not</u> on a public attorney's desire to please the judge in order to maintain a steady stream of appointments or keep one's job as chief executive of a public defender office. When the public fears that the court process is unfair, people are less inclined to show up for jury duty or to come forward with critical information about crimes. The proposal, as written, perpetuates the undue judicial and political interference that exists in the current Harris County indigent defense system. NLADA strongly recommends that any pilot public defender office in Harris County *and the current appointed counsel system* be overseen by an independent Board of Trustees as defined by national standards.

2. Judicial interference extends to allowing judges to opt out of the proposed public defender system. If certain judges are allowed to "opt out" of the public defender office, Harris County is setting itself up for a lawsuit based on the level of justice a client receives to be entirely dependent on whatever courtroom his cases happens to be docketed to. A judge that is offered the use of a public defender but declines for fear of slowing down his docket is making a choice to favor speed over due process. If Client A gets an attorney hand-picked by a judge that does not have to follow caseload standards, adhere to performance standards, or undergo training and Client B gets an independent public defender whose work is supervised and whose caseload is control, there will be non-uniformity of services. Counties across the country have ended up paying large settlements to clients that received poor services from assigned counsel attorneys.

3. Restricting the number of cases an attorney is expected to handle has benefits beyond the impact on an individual client's life. For example, the overwhelming percentage of criminal cases in this country requires public defenders. The failure to adequately control workload will result in too few lawyers handling too many cases in almost every criminal court action -- leading to a burgeoning backlog of unresolved cases. The growing backlog means that people waiting for their day in court fill local jails at taxpayers' expense. Conversely, forcing public defenders to handle too many cases often leads to lapses in necessary legal preparations. Failing to do the trial right the first time may lead to endless appeals on the back end – delaying justice to victims and defendants alike – and increasing criminal justice expenditures. And, when an innocent person is sent to jail as a result of public defenders not having the time, tools, or training to effectively advocate for their clients, the true perpetrator of the crime remains free to victimize others and puts public safety in jeopardy. The public defender office proposal does not include any kind of caseload controls. It should. As demonstrated by our research for KHOU-TV, Harris County must also impose binding caseload controls on the appointed counsel system as well.

4. *ABA Principle #2* states unequivocally that there should be a public defender office wherever the caseload is "sufficient" to sustain such an office. As the most populous

county in the country without a public defender office, Harris County is in violation of this principle. However, the standard does not state that a public defender office should be created for part of a system or that only certain case-types should flow through the office. If there are enough felonies, for example, to sustain a full-time public defender office then felonies should be handled by public defenders (except in cases of conflict). In a county the size of Harris, there will be plenty of conflict cases to sustain a significant portion of the appointed counsel system. Moreover, a number of studies have shown that a public defender office (if set up according to national standards) is more cost-efficient than an appointed counsel system, in part, because it can bring specialization to more complicated representation (like death penalty, serious sexual assaults, murder, etc.). So if you have to have a partial public defender office it should be specifically geared toward higher-level, more complex cases. A proposal that gears itself to only limited types of cases will also be unable to attract and retain high-quality lawyers beyond those who want to specialize in a field (like mental health).

5. A public defender office with limited case-types (especially a proposal that anticipates excluding felony representation) will make it difficult to attract the high caliber of attorney needed to train, mentor and supervise younger attorneys who see employment in a public defender offices as a way to gain needed experience.

Conclusion

Harris County stands at a precipice with a unique opportunity to improve indigent defense services or continue business as usual. Supervised, well-trained, independent public defenders with reasonable caseloads have a unique chance to not only address a client's specific criminal charges but to use the trauma of a criminal arrest for positive gain by addressing specific life-issues that may have led to the alleged criminal activity. As opposed to prosecutors, who necessarily have to take an adversarial approach to defendants, public defenders can build on the attorney-client trust relationship to help resolve problems a client may be having with substance abuse issues, public housing issues, immigration issues, or, in the case of children, educational needs that are not being met. By addressing the full array of client issues, public defenders can both reduce justice expenditures *and,* more importantly, potentially reduce the chances that a client will re-offend.

Please feel free to contact me with any concerns or questions. Thank you for your consideration of NLADA's position.

Sincerely,

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